Supreme Court, U.S.
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No. 03-679

In The
Supreme Court of the United States

GERALD BURGE,

Petitioner,

v.

RODNEY JACK STRAIN,
Sheriff of St. Tammany Parish,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Did the Court of Appeals err in reversing a *Monell* judgment against a parish sheriff based on inadequacies in recordkeeping policies where the plaintiff failed to offer any evidence of a pattern of constitutional violations resulting from the allegedly defective policies?

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REASONS FOR DENYING THE WRIT

According to the plaintiff's Petition, the sole question presented by the writ is whether a *Monell* claim for damage under U.S.C.A. section 1983 can ever arise "the first time" a longstanding policy, custom, or practice of a municipality results in a constitutional violation.

In reversing a jury verdict against the St. Tammany Parish Sheriff, the Court of Appeals found that plaintiff Gerald Burge failed to present evidence of even a single other constitutional violation arising from the Sheriffs' allegedly defective recordkeeping policies in the thirty years prior to the May, 2001 trial. The decision of the 5th Circuit Court of Appeals is entirely consistent with other cases from that circuit, and from the Supreme Court that require proof of more than a single instance of lack of training or supervision causing a violation of constitutional rights before such lack of training or supervision constitutes deliberate indifference – the standard required to support a finding of official liability on the part of the policymaker.

ARGUMENT

Gerald Burge filed this civil rights action in 1991, seeking damages as a result of his conviction in 1986 of the October, 1980 murder of Douglas Frierson. Burge alleged his conviction was obtained in violation of his constitutional right to a fair trial and due process as a result of the District Attorney's failure to provide his defense counsel with exculpatory information, specifically a statement given by Jean Frierson (the victim's mother)

to St. Tammany Parish deputy sheriff Gary Hale on the morning her son's body was discovered.

Burge has contended that the mother's statement was not provided by the Sheriff to the District Attorney prior to the 1986 trial, and that the Sheriff was therefore to blame for the D.A.'s failure to meet his obligations under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L. Ed. 2d 215 (1963). Burge attempted to prove at trial that the Sheriff's training, supervision, policies or procedures regarding the handling of records of criminal investigations were constitutionally defective.

At trial, undisputed evidence was presented that it was the St. Tammany Parish Sheriff's policy to turn over all resumes, reports, transcripts of witness interviews and all other documents generated during the course of a criminal investigation to the District Attorney. For purposes of its opinion, the 5th Circuit assumed that the Sheriff's Office failed to transfer the entire investigatory file to the District Attorney in the Burge case, and that such a failure was a cause of the *Brady* violation.[1] Considering all of the evidence offered at trial in the light most favorable to the plaintiff, the Court of Appeals concluded that Burge had failed to offer sufficient proof to support a finding that the Sheriff's recordkeeping training, policies and procedures were constitutionally defective. This conclusion by the 5th Circuit was mandated by the trial evidence.

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[1] The Sheriff has always disputed this contention by Burge. The loss by the District Attorney of his entire file on two separate occasions in the 1990s precluded any final factual resolution of this issue.

Burge's entire argument to this Court is based upon extremely brief excerpts from the testimony of District Attorney Walter Reed, and his chief investigator, Mario Arthur. The entirety of the testimony of these two witnesses was considered by the Court of Appeals and is specifically discussed in its opinion.

Mario Arthur (an investigator with the D.A.'s office), testified that he occasionally had to request copies of supplemental reports or transcripts of statements obtained from witnesses after the initial transmittal of the Sheriff's file to the D.A. Arthur also testified that the deputies in the records division of the Sheriff's office always quickly responded to his requests for documents, and that he had never requested a document from the Sheriff which had not been produced.

Walter Reed also denied that his office had experienced difficulties in obtaining records from the Sheriff during his 16 years as District Attorney, adding that only in a few instances did they ever have to call the Sheriff to look for something and on some of those occasions the information had already been sent to the District Attorney's Office and had just been overlooked. Reed stated that he has never had a staff member complain of any problems with getting information from the Sheriff.

Reed also testified that, other than the Burge case, he was aware of no case in which a claim had even been made that material had been withheld by the Sheriff from the District Attorney's Office.

In support of his Petition, Burge cites what he characterizes as the startling confession by District Attorney Walter Reed that "when you are dealing with 50,000 cases a year . . . we make mistakes and we're not perfect". The

District Attorney's admission of his staff's lack of perfection in dealing with 50,000 cases a year is hardly evidence of persistent, often repeated, constant violations by anyone and certainly not by the Sheriff's Office.

The Sheriff cannot be found officially liable for defects in his records keeping policy and procedures in the complete absence of evidence of a pattern of constitutional violations resulting from the stated policy and the manner in which it was followed. In thirty years, only the plaintiff in this single case has claimed that any documents or records contained in the Sheriff's investigative file were not forwarded by the Sheriff to the District Attorney.

It is undisputed, even by Burge, that proof of a pattern of violations is a prerequisite to a claim of deliberate indifference. The 5th Circuit Court of Appeals has so held in numerous opinions, most recently in *Oregon v. Houston*, 291 F.3d 325 (5th Cir. 2002). See also *Piotrowski v. City of Houston*, 237 F.3d 567 (5th Cir. 2001); *Thompson v. Upshur County, Texas*, 245 F.3d 447 (5th Cir. 3/15/01); and *City of Canton v. Harris*, 489 U.S. 378, 109 S.Ct. 1197, 103 L. Ed. 2d 412 (1989).

Isolated violations are not the persistent, often repeated, constant violations, that constitute custom and policy as required for municipal section 1983 liability. A customary municipal policy cannot ordinarily be inferred from single constitutional violations.

The burden of proof applicable to a claim of inadequate training was considered in *Brown v. Bryan County*,

219 F.3d 450 (5th Cir. 2000).[2] To prevail on such a claim, Burge must prove not only that the employees were inadequately trained but that the Sheriff was aware of the inadequacy of the training and was deliberately indifferent to the "known or obvious consequences" that constitutional violations would result therefrom.

Burge's claim that proof of a single constitutional violation resulting from the Sheriff's recordkeeping training or policies can support a *Monell* claim is premised almost entirely upon the *Brown* opinion. Although the majority in *Brown* did recognize that municipal liability can attach to a single decision by a *policymaker* not to train an individual, the Court made it equally clear that liability cannot attach unless the policymaker was *deliberately indifferent* to the need for additional training because the need for more or different training was so obvious and the inadequacy of the training was so likely to result in a violation of constitutional rights.

A comparison of the evidence presented in *Brown* confirms the adequacy of the Sheriff's records officer training in this case. In *Brown*, the Upshur County sheriff decided not to provide any training in arrest procedures to an inexperienced reserve deputy who had only been on the force for a few weeks. The reserve deputy, who was a close relative of the sheriff, had a fairly extensive criminal record which included an arrest for assault and battery.

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[2] *Brown* contained a pointed dissent, and en banc consideration was denied due to a tie vote of the 14 judges on the circuit. 235 F.3d 944 (5th Cir. 2000). *Brown* also predated *Thompson v. Upshur County, Texas*, 245 F.3d 447 (5th Cir. 3/15/01), which recognized that proof of a pattern of conduct is normally required.

The deputy had already engaged in an excessive number of "take down" arrests during his brief service prior to the incident. The plaintiff offered proof of several different training programs that were available, some free of charge, to the sheriff. Nevertheless, the Sheriff elected not to offer any training for the reserve deputy. As one might expect, the reserve deputy shortly thereafter injured someone by using excessive force in attempting a "take down" arrest. Given those facts, the court determined that the Sheriff was aware of sufficient information to make it obvious that training in arrest procedures was needed for this deputy and that in the absence of that training, a constitutional deprivation would occur.

Unlike the plaintiff in *Brown*, Burge has not identified a need for additional or different training other than the on-the-job training invariably provided by the Sheriff to records room officers. Burge offered no evidence of available additional or different training, nor of how it would have made a difference. The uncontested facts established that the records personnel trained under experienced deputies in that division. The efficiency of the records division during the twenty years of Deputy McCormick's service confirms that the training provided is more than sufficient. The Court of Appeals concluded without reservation that the evidence offered by Burge at trial failed to support a reasonable inference that the likelihood of violations of constitutional rights were "so obvious" that the Sheriff was deliberately indifferent to the need to institute more training, or to change his record handling policies in some other unspecified manner.

The record in this case is devoid of any proof of a custom of persistent, widespread failures to transfer investigatory information to the District Attorney upon

request which resulted in the deprivation of the constitutional rights of individuals. All of the evidence established the opposite.

Not only did Burge fail to prove a pattern of past constitutional violations, he produced no evidence of even a single instance of information being withheld or lost by the records personnel before or after the Burge case. Not one piece of evidence nor one witness was called to establish that the Sheriff's procedures for recordkeeping had resulted in information being lost or not provided to the District Attorney upon request on any occasion prior to the Burge case, or during the fifteen years between Burge's 1986 murder trial, and the 2001 trial in his civil rights action.

CONCLUSION

The Court of Appeals correctly concluded that the evidence offered by Burge at trial, interpreted in the light most favorable to the plaintiff, falls far short of satisfying the stringent, rigorous burden imposed upon him to prove a constitutionally deficient policy or practice of the Sheriff. Such proof requires a pattern of persistent, wide spread violations of rights which is completely lacking in this case. In the absence of such proof, the Sheriff cannot be found deliberately indifferent to the "known or obvious consequences" that constitutional violations would result

from existing practices. Respondent respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

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